

1 **BEFORE THE BOARD OF COMMISSIONERS**
2 **FOR LINCOLN COUNTY, OREGON**

3
4 In the Matter of)
5)
6 *The Ballot Measure 37 Claim of Charles Battles and*)
7 *Ester Battles (Husband and Wife)*) **ORDER NO. 11-05-330**
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9 WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37.
10 The Measure amends ORS Chapter 197 to require, under certain circumstances, actions to address claims
11 of owners of real property if government land use regulations reduce fair market property value; and
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13 WHEREAS Ballot Measure 37 provides that to maintain a claim, an owner of real property must
14 make a “written claim for compensation” to the government entity enacting, enforcing or applying a land
15 use regulation that allegedly restricts the use of the owner’s property and has the effect of reducing its fair
16 market value; and
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18 WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims procedures with
19 certain limitations; and
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21 WHEREAS Ballot Measure 37 requires payment of just compensation for a valid claim that
22 reduces fair market value of real property or, in the alternative and in lieu of payment of just
23 compensation, allows the County to modify, remove or not apply the land use regulation allegedly
24 supporting a claim reducing a property’s fair market value; and
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26 WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for compensation
27 and make decisions on those claims. A determination to modify, remove or not apply a land use regulation
28 or compensate a property owner must be based on substantial factual information and analysis; and
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30 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and ambiguous
31 provisions and that future litigation or legislative action will be necessary to clarify the measure’s terms.
32 The County, therefore, adopted procedures in Board of Commissioners Orders 12-04-318 and 4-05-120 to
33 assess claims in a timely manner and to require factual and analytical information as part of the claim so
34 the County will have a rational basis for its decision on each claim; and
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36 WHEREAS on June 3, 2005, Mike Battles, agent for Charles Battles and Ester Battles (husband
37 and wife, hereafter “claimants”), filed a Measure 37 claim on behalf of claimants seeking compensation, or
38 the modification, removal or non-application of land use regulations that limit land divisions and the
39 placement of dwellings in the T-C (Timber Conservation) zone on property located off of North Bayview
40 Road, east of the Alsea Bay, further identified as Tax Lots 200 and 1800 on Lincoln County Assessor’s
41 Map # 13-11-00-00. County records and the filed claim are found in Lincoln County Planning Department
42 File No. 14-LURCC-05 and by this reference are incorporated into this order as if fully set forth; and
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44 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-120, a
45 hearing was held on August 8, 2005 on the claim before the Planning Director as Hearings Officer, for the
46 purpose of receiving facts and evidence related to determining the validity of the claim. The claimants
47 provided testimony in support of the claim. There was no testimony in opposition to the claim.

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2 WHEREAS the Planning Director has issued his Department's Staff Report and Recommendation
3 that is attached to this order as Exhibit "A" and by this reference incorporated herein. That report finds
4 and concludes that the claim when submitted was valid and recommends that the Board, lacking funds for
5 compensation, in the alternative modify, remove or not apply the restrictions (commonly referred to as a
6 "waiver") from the current restrictions in Lincoln County Code (LCC) Section 1.1375 (T-C zone) that
7 preclude division of their property and establishment of a single-family residence on 80 acre parcels with
8 one single-family dwelling per parcel used in conjunction with farm or forest use. This "waiver" would
9 allow the claimants to use the property for uses permitted at the time of their acquisition of the subject
10 property in 1987 in accordance with the requirements of Subsection (8) of Ballot Measure 37; and

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12 WHEREAS subsequent to the application, hearing and staff report and recommendations Marion
13 County Circuit Court Judge Mary Mertens James decided in *Macpherson et al. V Department of*
14 *Administrative Services, et al.* (Marion County Circuit Court Case No. 05C-10444) that Measure 37 is
15 unconstitutional. A final judgment was entered in that case and no stay was granted by either the circuit
16 court or the Supreme Court. That decision is expected to be appealed and the results of that appeal are
17 very speculative. It is not known when a decision on the appeal will be issued. It is legally unclear whether
18 or not the Marion County Circuit Court's decision applies directly to Lincoln County's actions concerning
19 Measure 37 claims at this juncture; therefore the impacts on implementation of Measure 37 in Lincoln
20 County continue to be reviewed. What is known is that the circuit court decision applies to claims against
21 the State of Oregon and four other Oregon counties (not including Lincoln County). Those jurisdictions
22 are ordered to stop accepting and ruling on claims immediately; it appears the case also invalidates State
23 Measure 37 claims already granted; and

24
25 WHEREAS any claimant now proceeding on a claim does so at the risk of having any County
26 action on the claim declared null and void, and furthermore proceeds with the knowledge that properties
27 needing a waiver of State laws to move forward on development of a waiver are invalid and cannot be
28 honored by the County in any development application requiring such a waiver; and

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30 WHEREAS the Board has considered the report and recommendations of the Planning Director
31 and County Counsel, including the implications known at this time for the circuit court decision holding
32 Measure 37 unconstitutional. Given that the status of Measure 37 is in flux, the Board desires to proceed
33 cautiously with processing this Measure 37 claim. Therefore the Board will decide this Measure 37 claim
34 after placing the claimants on notice of the court decision. However, where a State waiver is required to
35 permit development, no permits will be issued, uses allowed, or decisions taken by the County on
36 development of the property until the case is finally decided and the State issues, if appropriate, its own
37 waiver or an existing waiver is reactivated by the appeals court's decision; and

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39 WHEREAS if Measure 37 is constitutional and still the law in Oregon, the Board finds it is in the
40 public interest, due to the lack of resources to pay compensation, to modify, remove or choose not to apply
41 the challenged land use regulation to the subject property and issue the "waiver" to claimants.
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1 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

2 1. Claimants Charles Battle and Ester Battles are placed on notice that the Marion County Circuit
3 Court has found Measure 37 unconstitutional. While appeals of that decision are pending, it applies
4 directly to Measure 37 claims made to the State of Oregon. Claimants proceed in this matter knowing
5 that any action taken by the Lincoln County Board of County Commissioners could be null and void if
6 the circuit court decision is upheld on appeal and that Lincoln County does not waive any rights or
7 remedies under law by granting a “waiver” under the challenged law.

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9 2. If Measure 37 is unconstitutional or other wise void as found by the appeals courts, then this
10 Order shall be and is automatically rescinded without any further action by the Board of Commissioners.
11 Claimants have no vested right in this decision should the measure be unconstitutional.

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13 3. If Measure 37 is constitutional, the Measure 37 claim of Charles Battles and Ester Battles,
14 husband and wife, Lincoln County Case File No. 14-LURCC-05, was a valid claim when filed on June 3,
15 2005. The Board of Commissioners declines to pay just compensation for the claim. In lieu of
16 compensation, Lincoln County Code (LCC) Section 1.1371(3) is modified, removed or not applied for
17 Charles Battles and Ester Battles against the subject property to the following effect:

- 18
19 • The non-application of regulations would be limited to the minimum parcel size
20 requirements and restrictions on dwellings provided for in LCC 1.1375 allowing claimants
21 to create 80 acre homesites, with a single-family dwelling as permitted by the T-C zone in
22 effect at the time of acquisition of the subject property. All other provisions of the Lincoln
23 County Code would continue to apply.
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25 • Establishment of additional land parcels on the subject property, if allowed, and placement
26 of dwellings would be subject to all applicable public health and safety regulations,
27 including but not limited to land division procedures, building codes, on-site sewage
28 disposal rules and requirements, flood hazard regulations, and county road approach
29 permit requirements.

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31 4. Measure 37 is currently invalid as applied to claims against the State of Oregon. A State of
32 Oregon “waiver” under Measure 37 may be required for the development or use of the subject property.
33 Lincoln County lacks authority to waive state regulations or laws. This Order does not affect any land
34 use regulations of the State of Oregon. The claimants are responsible for seeking compensation or
35 “waiver” from the state of any applicable state laws. The Planning Director shall send notice of the
36 Board’s decision to the Director of the Department of Land Conservation and Development. If a State
37 Measure 37 claim is required, no use, development, permits or other development applications will be
38 processed or approved by Lincoln County until the appeals of the Marion County Circuit Court are
39 decided and the State has issued, if appropriate, its own “waiver”.

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41 5. This “waiver” provision is void if the property owner or property owner’s successors are
42 compensated by another governmental agency, including the state, for a reduction in value resulting from
43 the same or similar land use regulations on the subject property.
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1 6. Excepting new land use regulations imposed after the date of this decision, and subject to
2 applicable review rights as permitted under Measure 37, this final decision bars a subsequent Measure 37
3 claim against the County as to the subject property.

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5 7. Transferability of the "waiver" granted by the County under this decision is unknown under the
6 current status of Measure 37. Transferability of the "waiver" is allowed to the extent permitted by law.
7 Granting of this "waiver" does not commit the County to issuance of development or building permits, if
8 those actions are not allowed under law.

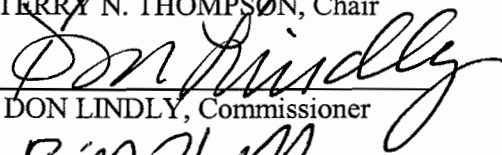
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10 8. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln County
11 Clerk without payment of recording fees.

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13 9. Copies of this Order be provided to the Planning Director, County Counsel, and claimants.

14 DATED this 2nd day of November, 2005.

15 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

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18 _____
19 TERRY N. THOMPSON, Chair

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21 _____
22 DON LINDLY, Commissioner

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24 _____
25 BILL HALL, Commissioner

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27 K:\Measure 37\M-37 Orders\order Battles 14-LURCC-05.DOC